

Remarks

Reconsideration of this Application is respectfully requested. Claims 1-39 are pending, with claims 1, 10, 24, 34 and 35 being the independent claims. Applicant respectfully requests that the Examiner reconsider and withdraw all outstanding rejections.

Claim Rejections Under 35 U.S.C. § 103(a)

Claims 1, 6-10 and 15-39 were rejected under 35 U.S.C. § 103(a) as being unpatentable over certain prior art cited in Information Disclosure Statements filed by Applicant ("AAPA") in view of U.S. Patent Publication No. 2004/0261796 to Butler ("the Butler publication").

Claims 2-5 and 11-14 were rejected under 35 U.S.C. § 103(a) as being unpatentable over AAPA in view of Butler and further in view of U.S. Patent No. 4,227,524 to Galerne ("Galerne")

The Butler Publication is not Prior Art under 35 U.S.C. §§ 102(a) or 102(b)

The present application was filed on September 11, 2003. The Butler publication was filed on June 30, 2004 and claims priority to *Provisional* Application Serial No. 60/483,754, filed June 30, 2003 ("the '754 provisional application"). The Butler publication was published on December 30, 2004 as Pub. No. 2004/0261796. For 35 U.S.C. § 102(a) to apply, "the reference must have a **publication date** earlier in time than the effective filing date of the application." See MPEP §706.02(a) (emphasis added). An unpublished provisional application does not qualify as prior art under 102(a). Thus, the Butler Publication does not qualify as prior art under 35 U.S.C. § 102(a) (i.e., was not published prior to the filing date of the present application) or 35 U.S.C. §102(b) (i.e., was not published more than one year prior to the filing date of the present application). The Applicant submits that **at best** Butler can only qualify as prior art under 35 U.S.C. § 102(e).

Because the filing date of the Butler publication is after the filing date of the present application, the disclosure in the Butler publication that is not also supported by the '754 provisional application does not qualify as prior art to the present application. The Applicant respectfully submits that the subject matter related to a thermal probe to monitor the patient

temperature disclosed in the Butler publication was not included in the '754 provisional application. Accordingly, to the extent the Examiner relies on the Butler publication as disclosing a "user sensor" recited in each of the independent claims, the Butler publication does not qualify as prior art.

Claim Rejections

The Examiner concedes that the AAPA reference does not disclose a "user sensor" as recited in each of independent claims 1, 10, 24, 34 and 35. The Examiner relies on the Butler publication for support for a user sensor. As discussed above, the Butler publication cannot be relied upon as prior art for a "user sensor" as recited in the claims.

Accordingly, for at least the above reason, independent claim 1 and its dependent claims, independent claim 10 and its dependent claims, independent claim 24 and its dependent claims, independent claim 34 and its dependent claims, and independent claim 35 and its dependent claims are each allowable over the cited references.

The Applicant respectfully requests that the rejection of claims 1-39 be withdrawn.

Conclusion



All of the stated grounds of rejection in the Office Action have been properly traversed or rendered moot. Applicant therefore respectfully requests that the Examiner reconsider and withdraw all outstanding rejections. Applicant believes that a full and complete response has been made to the outstanding Office Action and, as such, the present application is in condition for allowance. If the Examiner believes, for any reason, that further personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at the number provided.

Prompt and favorable consideration of this Amendment is respectfully requested.

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